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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-525

JOE D. ROGERS and GERTRUDE K. ROGERS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit which affirmed Partial and Final Summary Judgments of the United States District Court for the Central District of California.

Opinions Below.

The Opinion (Memorandum of Affirmance) of the Court of Appeals for the Ninth Circuit is attached as Appendix I. It has not been reported. Rehearing was sought. The Order Denying Rehearing is attached as Appendix II. The District Judge did not file an opinion at any time.

Constitutional Provisions, Statutes and Regulations Which the Case Involves.

The Fifth Amendment to the Constitution of the United States.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sections 2289, 2290 and 2291 of the Revised Statutes of the United States.

Sec. 2289. Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter-section or a less quantity of unappropriated public lands, upon which such person may have filed a pre-emption claim, or which may, at the time the application is made, be subject to pre-emption at one dollar and twenty-five cents per acre; or eighty acres or less of such unappropriated lands, at two dollars and fifty cents per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same have been surveyed. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already

owned and occupied, exceed in the aggregate one hundred and sixty acres.

Sec. 2290. The person applying for the benefit of the preceding section shall, upon application to the register of the land-office in which he is about to make such entry, make affidavit before the register or receiver that he is the head of a family, or is twenty-one years or more of age, or has performed service in the Army or Navy of the United States, and that such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person; and upon filing such affidavit with the register or receiver, on payment of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he shall thereupon be permitted to enter the amount of land specified.

Sec. 2291. No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death; proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the Government of the

United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.

30 Statutes at Large 1767, Proclamation #5, March 2, 1898.

Whereas, it is provided by section twenty-four of the Act of Congress, approved March third, eighteen hundred and ninety-one, entitled, "An act to repeal timber culture laws, and for other purposes", "That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof";

And whereas, the public lands in the State of California, within the limits hereinafter described, are in part covered with timber, and it appears that the public good would be promoted by setting apart and reserving said lands as a public reservation:

Now, therefore, I, William McKinley, President of the United States, by virtue of the power in me vested by section twenty-four of the aforesaid Act of Congress, do hereby make known and proclaim that there is hereby reserved from entry or settlement and set apart as a Public Reservation all those certain tracts, pieces or parcels of land lying and being situate in the State of California, and within the boundaries particularly described as follows, to wit:

(Here follows lengthy land description.)

Excepting from the force and effect of this proclamation all irrigation rights and lands lawfully acquired therefor and all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; and all mining claims duly located and held according to the laws of the United States and rules and regulations not to conflict therewith:

Provided, that this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing, settlement or location was made.

Warning is hereby expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 2nd day of March, in the year of our Lord one thousand, eight hundred and ninety eight, [SEAL] and of the Independence of the United States the one hundred and twenty-second.

William McKinley

By the President:

John Suerman

Secretary of State

The Act of June 4, 189[illegible], c. 2, § 1. 30 Stat. 36.

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations. [*30 Stat. L. 36.*]

16 United States Code § 478.

Nothing herein [§§ 473-478, 479-482, 551 of this title] shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations [national forests], or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior [Agriculture]. Nor shall anything herein prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: Provided, That such persons comply with the rules and regulations covering such forest reservations [national forests]. (June 4, 1897, c. 2, § 1, 30 Stat. 36.)

36 Code of Federal Regulations § 212.8 (1965).

§ 212.8 *Ingress and egress.*

(a) *Policy in acquiring and granting access.* To assure effective protection, management, and utilization of lands administered by the Forest Service and intermingled and adjacent private and public lands, and for the use and development of the resources upon which communities within or adjacent to the National Forests are dependent, the Chief shall as promptly as is feasible obtain needed access thereto and shall grant appropriate access across National Forest and other lands and easements administered by the Forest Service to intermingled or adjacent landowners. No road or highway shall be constructed until it is authorized in writing.

(b) *Actual settlers and other persons residing within the National Forests and other areas administered by the Forest Service.* Actual settlers and other persons residing within the National Forests and other areas administered by the Forest Service shall be permitted ingress and egress over the same and use of existing roads and trails in order to reach their homes and to utilize their property: *Provided,* Such ingress and egress or use shall conform to rules and regulations governing the protection and administration of the lands and the roads or trails to be used.

(c) *Others.* Entering upon the National Forests and other lands administered by the Forest Service and use of existing roads and trails shall be permitted for all proper and lawful purposes, subject to compliance with rules and regulations governing the lands and the roads or trails to be used.

Jurisdiction.

Jurisdiction of this Court is invoked to review a Final Judgment of the Court of Appeals for the Ninth Circuit, upon the grounds that (1) the Court of Appeals, by its Judgment or Order affirming the Summary Judgment of the District Court, decided important questions of federal law which had not been, but should be, determined and settled by this Court, and (2) the Court of Appeals by its Judgment or Order decided federal questions so as to deprive these petitioners of their property without due process of law and so as to take their property for public use without just compensation, contrary to the Fifth Amendment to the Constitution of the United States.

1. The Judgment of the Court of Appeals which is sought to be reviewed was dated, filed and entered April 26, 1974. Rehearing was sought by petition filed within the allowed time.

2. Rehearing was denied by Order dated, filed and entered August 9, 1974. An extension of time to file this petition was not sought.

3. The statutory provision believed to confer on this Court jurisdiction to review the Judgment or Order in question by Writ of Certiorari is Subdivision (1) of Section 1254 of Title 28 of the United States Code.

Questions Presented for Review.

1. Was the extent or scope of the easement of ingress and egress appurtenant to an isolated parcel of land granted by land patent by the United States in 1894, under the homestead laws, limited to the mode and means of ingress and egress across the surrounding public land at the time of the grant, or did the ap-

purtenant right to cross the completely encircling public land include the right of the landowner and his successors to reasonably alter the mode and means of ingress and egress from time to time according to the changing times and means of transportation available and the changing manner and extent of utilization of the granted land and which might reasonably have been foreseen by Congress?

The homestead laws did not expressly provide for access. They required the entryman to enter, settle on and improve the land with a dwelling, and actually cultivate and reside on the land for a number of years, in order to merit the grant.

2. Did the subsequent inclusion of the public land which completely surrounds the granted land in a new federal forest reserve or national forest reserve have the effect of empowering the government, acting through the Forest Service of the Department of Agriculture, to either terminate exercise of the appurtenant easement previously and necessarily granted by implication or so limit its extent or scope as to times, mode or means of ingress and egress that access would be suspended or burdened with maintenance for concurrent government and public use? It is recognized that the government, acting in its sovereign capacity, would have the right to reasonably protect national forest land held for all citizens. The question asks whether the government may constitutionally burden, interfere with, limit or suspend the exercise of the rights of ingress and egress, granted prior to government withdrawal of the surrounding land.

3. What constitutes the "affirmative acts of misconduct" by a government representative acting in the scope of his authority and which this Court has de-

clared must be shown to have occurred before the defense of equitable estoppel may be asserted against the government in instances in which it acts in its sovereign capacity? The decisions of this Court have not disclosed the nature of the affirmative acts which will satisfy the rule, to our knowledge, and the facts in this case seem particularly strong.

4. Were petitioners, successors in interest by purchase of the homestead grantee, deprived of due process of law and was their property taken without compensation, (a) when access to their intermingled patented private land within and entirely surrounded by national forest land was limited by the adjudication of the Court of Appeals to a foot trail used by the entryman in 1894 or (b) by the determination of the Court of Appeals that petitioners have no easement for *any* access road or *any* new motor vehicle access roadway and no means of access except as allowed under a National Forest special use permit which would be issued for a limited time, would be expressly made terminable or suspendable at the discretion of a Forest Service officer, and would require them to construct and maintain the required road for use by the government of the United States and the State and others the Forest Service might choose to authorize to use it?

Statement of the Case.

The land of petitioners is in Ventura County, California, within the territorial jurisdiction of the District Court for the Central District of California. Petitioners reside within the jurisdiction of that Court. The basis for federal jurisdiction was Title 28, United States Code, Section 1345.

The government filed this civil action for injunctive relief and to prevent an asserted trespass. The Complaint alleged ownership by the United States of certain subdivisions of land and the reservation of the public land therein from the open public domain as a forest reserve in 1898. It also alleged ownership by petitioners of 160 acres of so-called intermingled land, entirely within and surrounded by the government land. The government land became a national forest in 1936 and came under the supervision of the Forest Service of the Department of Agriculture, and thus subject to its administrative regulations, at that time.

The gravamen of the Complaint was the relocation or realignment by petitioners in 1964 of their access road some 3.4 miles in length connecting their intermingled 160 acres and the nearest public road (all within the National Forest), without first securing a Forest Service special use permit. Among other defenses petitioners pleaded equitable estoppel because of the acts of the Forest Service District Ranger which had induced them to undertake and complete the construction after they had applied to him for the permit and had been advised by the Ranger that none would be required.

Petitioners had sought by Counterclaim to secure a declaration that they owned an appurtenant easement extending across the surrounding land of the United States for access by road for the enjoyment and utilization of their private land. The government denied they had an easement and denied they had any right of access except such as would be permitted by a Forest Service special use permit, the form and conditions of which were attached to the Complaint. The required form provided in part that it was issued for a limited

period and included the right of Forest Service officers to terminate or suspend the permit and uses under it at their discretion, imposed certain burdens as to maintenance, and reserved the right to permit others to use the road.

A number of years prior to 1894 one John Foley had entered the then unoccupied open public land comprising the 160 acres under the homestead laws of the United States. He had occupied the land, improved it with a dwelling, and had cultivated it and lived on it for the required period of years. Having made the required proof and paid the fees required by law, he was granted the land by patent in 1894. The District Court found that at the date of the patent access was by foot trail.

About four years after the grant to Mr. Foley the encircling open public lands were first withdrawn from entry under the public land laws as a forest reserve. (Presidential Proclamation #5, Mar. 2, 1898, 30 Stats. at Large 1767.) The patent had granted the 160 acres to Mr. Foley "to have and to hold the said tract of land, with the appurtenances thereof, unto the said John Foley and to his heirs and assigns forever." The presidential proclamation which established the first forest reserve in 1898 expressly excepted from its effect "all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law".

There being no other road, a wagon road to the nearest public road was constructed by Mr. Foley at least as early as 1902 to provide access by wagons and

teams. The original trails in the area were foot or cattle trails and could not be used by vehicles. The wagon road was not covered by a special use permit. None was required until after 1936. Built in washes for much of its length, the road was constantly in need of repair because of damage caused by periodic storms. It was not a reliable means of access to the ranch and was dangerous, but it could be and was used by 4-wheel drive motor vehicles for access to the 160 acres. It connected the homestead land with the nearest public road known as the Lockwood Creek Road. In 1964 the need for relocation and improvement for use by 2-wheel drive vehicles caused petitioners to decide to realign and reconstruct the road.

The Forest Service District Ranger responsible for this general area of the Los Padres National Forest had informed petitioners of the regulatory requirement of an application for a special use permit and that such a permit should be obtained before the construction they planned could begin. Petitioner Joe D. Rogers filled out the Forest Service form and signed and filed it with the District Ranger. The next day, September 8, 1964, the District Ranger completed the Report portion of the form, as he was required to do, and then submitted it to the headquarters of Los Padres National Forest. The forest supervisor at that headquarters possessed the delegated authority to issue special use permits, and under the Forest Service regulations that authority could have been delegated to the District Ranger.

The form described the road to be constructed as 12 feet in width, to be built by bulldozer. The portion signed by the District Ranger stated that the landowners desired 2-wheel drive vehicle access to their

private land surrounded by national forest land, that the existing 4-wheel drive road did not provide suitable access, and that the proposed road would give the Forest Service fine access to over three miles of forest land.

The District Ranger eventually notified petitioners by word of mouth that in conference with his supervisors at the headquarters of the Forest it had been decided that a certain portion of the relocation of the road would not require a permit and would be considered as the same road as the 4-wheel drive road which petitioners desired to relocate, provided the new road construction was within a quarter of a mile of the existing road and providing the point of entry on the public road was not changed. Petitioners relied on this notification, modified their plans and constructed the road 12 feet in width, in part along the old wagon road route and in part within a quarter mile of it, and did not move the intersection, all in accordance with the notice from the District Ranger. The work was accomplished by and at the expense of petitioners using a bulldozer and other equipment. The District Ranger supervised the construction on the job from time to time, specified where a locked gate was to be placed in order to control public access and specified those who would have keys to the lock. He furnished Forest Service blasting powder to facilitate necessary tree stump removals. On completion he inspected and approved the realigned and improved 12-foot-wide access road. Thereafter the road was used by petitioners, the Forest Service, and public officers such as the Sheriff.

The Ranger's affidavit admitted that he had told petitioners that a permit would not be required for the conversion of the old road to a 2-wheel drive road. His affidavit carefully stated he had told Mr. Rogers that no permit would be required if the Rogers followed the old road and that he had not said to him that there could be any deviations from the old road. He denied that he had told the Rogers they could deviate from the original wagon road route and stated he had told them of the need for a permit for any road work not on the original road.

The Ranger was transferred from this National Forest prior to the filing of the civil complaint. His version of what he had told petitioners was controverted by several affidavits including that of a disinterested party. The latter stated that he and his wife were present with petitioners and the District Ranger after the Rogers had applied for the permit and heard the Ranger state to Mr. Rogers that it had been decided that a permit would not be required if the realignment would be kept within a quarter of a mile of the original road. In the conversation Mr. Rogers told the District Ranger the plans would be changed and that he would only do the road work which would be within the quarter mile. In the conversation the Ranger said that if they kept within that distance it would be considered the same road. It was not contended that the relocation had exceeded the quarter mile limitation. The Ranger did not controvert the other facts shown by the affidavits of petitioners and others and relating to the Ranger's super-

vision, inspection, approval on completion, supplying of Forest Service blasting powder to facilitate the work and use following completion.

The inconsistency is possibly explained by the statements in other affidavits that the District Ranger told petitioners that work within a quarter mile would be considered as the old road and that this had been the way they did it "up north." The bulldozer was used for over 100 hours, and it is inconceivable that the work would have been allowed to proceed for that time if a permit had been required.

The affirmative acts of the District Ranger induced petitioners to leave portions of their historic and unquestioned access road and to construct at considerable expense a realignment and improvement of the access road.

The District Court found as a matter of law that petitioners had not established any easement or right of way to construct a new motor vehicle access roadway, and that they had acquired the 160 acres (then surrounded by National Forest land) with a right of access thereto by existing trails and had not evidenced any right to construct any other or different access to their land.

On the Counterclaim the Court found that the government's land patent did not describe or include any easement or right of way for construction, maintenance, or use of a new motor vehicle access roadway over the National Forest lands; that at the time of the patent

Mr. Foley used a foot trail for ingress and egress, and that petitioners as his successors acquired the right of ingress and egress across the National Forest lands by the trail used by Mr. Foley. It further found that petitioners as such successors in interest did not acquire by the purchase of the 160 acres any easement or right of way to construct, maintain or use a new motor vehicle access roadway, or *any* road, over the National Forest lands, and did not have *any* easement for construction, maintenance and use of an easement and access road over the Forest lands.

The District Court concluded that petitioners had a right of way for access by way of a trail through the Forest and could not claim an easement therefrom for construction of a motor vehicle access road over a new and different route. It further concluded that petitioners were in trespass and should be enjoined from use of the 2-wheel drive road, and should be required to obtain a special use permit for any activities in connection with the construction of any way of access.

The Final Summary Judgment granted the government exclusive possession of the entire 3.4 miles of access road, including the parts within the old road, and enjoined construction, maintenance or use of *any* road constructed without the government's consent and without first obtaining and complying with a special use permit.

REASONS FOR GRANTING THE WRIT.

A. The Necessarily Implied Easement Right of Ingress and Egress Appurtenant to Land Granted by the United States Under the Homestead Law Was Not Intended by Congress to Be Limited in Extent or Scope to the Mode or Means of Access in Use at the Time of the Grant. The Isolated Landowner Necessarily Had the Right by Virtue of the Grant to Change the Mode and Means as Reasonably Required for Utilization of His Land.

1. The question of the intent as to rights of access and the extent thereof to be necessarily implied to Congress in grants of public land, made for consideration such as here involved (the prior entry, occupation, cultivation, improvement and residence required by statute), has not been the subject of any decision of this Court. The question and the answer are of growing importance because of the proliferation of reservations and withdrawals and the need and desire of private landowners to fully utilize their lands in ways which might reasonably have been foreseen and desired by Congress.

2. The Court of Appeals affirmed the Summary Judgment which had declared the landowner had no appurtenant or any easement for ingress and egress and no access by any road (whether realigned or otherwise), and limited the means of access to the foot trail of 1894 and the mode to foot or horseback travel.

3. The question is one of federal law, for the homestead act did not expressly provide for access and did not specify that local laws would apply. General principles of the law of implied easements for access require the intent of the grantor to be ascertained. The homestead act under which the patent here involved was

granted is found in Secs. 2289, 2290 and 2291 of the Revised Statutes.

The Memorandum of Affirmance of the Court of Appeals completely ignored the issue, although it was raised in the Appellants' Opening Brief. When raised again in the Petition for Rehearing, the Court of Appeals seemingly relied upon the statement by the government in its Response to the Petition that "The sole thrust of both this Court and the District Court's opinions is to halt the unauthorized use of government lands." (The District Judge did not file an opinion.) Nevertheless, the affirmance by the Court of Appeals left outstanding a Judgment which had adjudicated that the patentee of the lands had been granted by implication only the right of access by the foot trail in use in 1894 and no other. That affirmance left standing an adjudication which necessarily determined that it had been the intent of Congress to give homesteaders who had been induced to come upon the public lands a right of access not appurtenant to their land and completely restricted to the means and mode of ingress and egress in use at the date of patent.

4. The questions of federal law were decided erroneously. An intent should not be imputed to Congress to so unreasonably foreclose and frustrate its grantees in the utilization of their granted lands.

5. The homestead laws were enacted to encourage settlement, cultivation and improvement—the peopling of the great public lands. *Webster v. Luther*, 163 U.S. 331, 339-340 (1896). Grants by the United States are not to be so construed as to defeat the intent of Congress or to withhold that which is given either expressly or by necessary or fair implication. *United States v.*

Denver & Rio Grande Ry. Co., 150 U.S. 3, 14 (1893). We recognize the principle that grants by the sovereign are to be strictly construed. The choice here is of the guiding rule to be followed where, as here, the grantee is induced to expend effort, years of his life, and personal funds in cultivating, occupying and improving raw and isolated public lands, all to secure the reward of a grant of title to the land and the dwelling he had built thereon and which had been promised to him by Congress in the homestead acts. The intent of Congress would be defeated at the outset if the settler on lands not abutting a public highway could only enjoy a strictly limited means and mode of ingress and egress. The intent would similarly be defeated if the grantee could not fully utilize his lands for ranching purposes because of inability to obtain and use progressively modern and improved vehicles and equipment with his land, and for himself and his family. If the right would not carry over to successors and the future, the homesteader would be less than enthusiastic to "people" the land, for the value of his asset would surely dwindle to nothing as the years passed.

6. In 1959 the Acting Solicitor of the Department of the Interior, under delegated authority, gave his opinion in *Access over Public Lands*, 66 Interior Department 361 at 363, that grants of public lands carried with them a right of ingress and egress by necessary implication. In 1971 the Interior Department Board of Land Appeals decided *Koenig*, 4 IBLA 18 under delegated authority from the Secretary, and there followed the Acting Solicitor's Opinion of 1959, *supra*.

In *United States v. 9,947.71 Acres*, D. Nev. 1963, 220 F. Supp. 328, it was held that where the motor truck and passenger vehicle access road across the open

public domain affording ingress and egress to and from patented and unpatented mining claims had been taken by the federal government declaration of taking, a property right had been taken and there was a right to compensation.

In *Bydlon v. United States*, 175 F. Supp. 891, 898 (Ct.Cl. 1959) the Court of Claims recognized that the United States as a grantor of public land also conveys by implication whatever is necessary to the beneficial use of the property and held that a taking of a right of access in such case was compensable.

The Ninth Circuit itself in *United States v. Dunn*, 478 F. 2d 443 (1973) declared that where public lands had been patented and left entirely surrounded by other public lands, the doctrine of easement for access by implication and necessity could apply.

7. The historic and continuing practice of the Secretary of the Interior of expressly including "appurtenances" in public land patents of all sorts without express Congressional authority for the language, demonstrates the construction placed by the Secretary upon the language of such legislation and the intent of the Congress. The failure of Congress to question or end the practice, which carries out the Secretary's interpretation of the Congressional intent under several acts, strongly suggests acceptance and concurrence in the interpretation that grants of appurtenant easements were intended.

There is no departmental authority for a proposition to the contrary. The Secretary of the Interior had uniformly granted homestead and other lands with the "appurtenances thereof." Such appurtenances must have been intended to include the very essential right of in-

gress and egress to enable the grantee to enjoy the subject of the grant.

8. If the grant of the appurtenant right of ingress and egress is limited in its extent and scope to the mode and means in use at the time of the grant, we must reach such a conclusion only by attributing an unfair and unreasonable intent to Congress.

The authorities disclosed by the text writers support the announced rule that an easement of necessity for ingress and egress and created by implication is not to be limited in its extent or scope so as to prevent the land conveyed from being enjoyed and utilized in the manner which should have been reasonably foreseen or contemplated by the grantor. This, it is said, is particularly true where, as here, consideration is present. The interpreter is warranted in assuming that the conveyance contemplated a normal development of the use of the dominant tenement, that is, the granted land, and normal development in the means of access thereto. Restatement of the Law of Property (Servitudes) § 484 at 3020-3023 (1961) and 3 Powell, Real Property §§ 415 at 508-511, § 416, at 517-519 (1966).

9. Those lawfully occupying the public lands were and are protected by Congress against efforts by others to prevent or obstruct entry on public lands. Act of February 25, 1885, c. 149, §§ 3 and 4, 23 Stat. 322; 43 USC §§ 1063 and 1064. Where there was or is substantial public use of a particular route of travel over public lands by an entryman or others, the route can become a public highway. R.S. § 2477, 43 USC § 932. It is only reasonable to imply to Congress the intent to provide a continuing useful means of ingress and egress, to be exercised according to the current uti-

lization of the private land from time to time and with the current types of motor or other vehicles. The affirmance by the Court of Appeals gave no apparent consideration to the intent of Congress. The Summary Judgment severely limited the intent and the market value of the private land.

10. The legislative history leading to the Act of March 3, 1891, 26 Stat. 1098, 43 USC 161 and providing for a repeal of the timber culture law and the enactment of the new homestead law, particularly that found in 22 Cong. Record, pp. 3545-3547, incl., Feb. 28, 1891, discloses that a conference committee report had been submitted on amendments by the Senate to H.R. 7254, the bill substituted for H.R. 5404 to repeal the timber culture laws. Senator Call said in part: "I believe" . . . the public domain lands . . . "should be reserved for homes for the people who live upon and cultivate them." Mr. Plumb replied ". . . no bill has passed this body or any other legislative body that more thoroughly consecrates the public domain to actual settlers and home-owners than does the bill in the report just read. That is the central idea of the bill." The report was concurred in by the Senate and the bill was eventually approved March 2, 1891. (22 Cong. Record, p. 3824.)

B. The Subsequent Inclusion of the Surrounding Public Lands in a Forest Reserve or National Forest Did Not Terminate or Modify the Extent or Scope of the Easement Appurtenant to the Encircled Patented Land.

1. Nothing in the presidential proclamations here involved nor the acts of Congress relating to creation of the National Forests purported to take or damage lands or interests theretofore granted and in private

ownership. The presidential proclamations expressly excepted valid entries and applied only to lands of the United States. Those lands were already subject to the burden of the easement for ingress and egress, and thus the easement was not part of the public domain. That which was not part of the public domain could not have been within the meaning of the term "Public Lands" as used in the act cited in the proclamation. The forest reservation could not cut off or limit previously existing vested rights.

2. A copy of the first proclamation of 1898 is included in this petition as disclosing no intent to disturb settlers. It seems to need no argument to show that private lands and their existing property rights of access were not intended to be disturbed. Congress intended to protect actual settlers and those lawfully on the lands in national forests. The act of June 4, 1897 discloses this and with minor changes it is now found in 16 USC § 478.

3. The Secretary of Agriculture published in 1965 an amendment of Paragraph 212.8 of 36 C.F.R. (30 F.R. 5477, Apr. 16, 1965) which clearly disclosed his interpretation of the proclamation which led to and created Los Padres National Forest. Designed, and so stated, to assure effective utilization of lands including intermingled private lands in national forests, it directs the Chief of the Forest Service to promptly obtain "needed access thereto" and provides that he "shall grant appropriate access across National Forest" lands to intermingled landowners.

The Secretary of Agriculture has thereby established the procedure to care for the property right of access of those without access. He must thereby have recognized that modern means of transportation and in-

creased burdens of use would require substantial roads for the utilization of the private lands. The amendment forbids construction of such a road until authorized in writing and says nothing of a special use permit such as proposed here.

4. To limit the exercise of the right of access to a period of time, or to the continuing power of Forest Service officers to suspend or terminate it, or to burden the intermingled landowner as required by the Forest Service clearly reduces the property right of continuing access implied in the grant of the land, and this obviously unconstitutional deprivation of property without trial and compensation is an intent one should not lightly attribute to Congress. A special use permit in the simple form of the authorization contemplated by the 1965 regulation could be unobjectionable. The conditions in the form attached to the Complaint in this action and generally but not completely referred to in this petition are unlawful as contrary to the Fifth Amendment.

C. This Court Should Issue the Writ and Define Upon the Facts of This Case, Viewed Most Strongly Against the Government, Just What Affirmative Acts of Misconduct Will Permit of a Defense of Equitable Estoppel Against the Federal Government in Cases in Which the Government Is Acting in Its Sovereign Capacity.

1. This Court has not determined in any case known to petitioners what will constitute the "affirmative misconduct" which will estop the government under a defense of equitable estoppel in instances in which it is acting in its sovereign capacity. The answer seems unclear even within this Court. *United States Immigration and Naturalization Service v. Marciano Haw Hibi,* 414

U.S. 5 (1973), wherein Justice Douglas dissented and Justices Brennan and Marshall concurred with him.

2. Well meaning private citizens could hardly have been more thoroughly trapped into constructing cuts and fills for and using a realigned access road in a national forest. This is not a situation where the private party was led to do something the law did not sanction or permit (*Utah Power & Light Co. v. United States,* 243 U.S. 389, 409 (1916) and *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380 (1947)), but rather was led to perform road realignment construction in a national forest by the government officer who had the responsibility of protecting the area and of seeing to it that required permits were obtained before construction. He alone, or with his supervisors, construed the regulatory requirement of a permit as not applicable to a limited realignment of an existing road in this case where the Forest Service (the government) would benefit by the new construction. It is no answer to say that petitioners should have taken an administrative appeal or gone to court. Here there were affirmative acts. Here we have no failure to act. Here we have an interpretation of regulations and a ruling followed by advice and assistance from the responsible government employee and a resulting benefit to the government acting in its sovereign capacity.

The penalty to be paid by petitioners is the cost of reconstructing the natural terrain under the Summary Judgment, not to mention the cost to them of this litigation. Here is a clear case for a definition of what is meant by "affirmative acts of misconduct."

3. A mechanized trail did not require a permit to be constructed in California National Forests in 1964. The width of a constructed mechanized trail was not

specified in the Forest Service regulations, Manual or Trails Handbook. Gradients were, and the construction by petitioners met the requirements. The Court of Appeals held as a matter of law that a 12-foot road way was a road, not a trail. It did not refer to the regulations or the Handbook or Manual of the Forest Service. Without discussing or describing them (and they had been brought to its attention), the Court of Appeals simply brushed off the facts disclosed by the affidavits. We do not know just what facts it had in mind, but those disclossd herein are found in the record.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN B. LONERGAN,
Attorney for Petitioners.

Of Counsel:
LONERGAN, JORDAN, GRESHAM,
VARNER & SAVAGE.

Dated October 31, 1974.

APPENDIX I.

Memorandum of Affirmance.

United States Court of Appeals, for the Ninth Circuit.

United States of America, *Appellee,* vs. Joe E. Rogers and Gertrude K. Rogers, *Appellants.* No. 72-2148, No. 72-2456, (Consolidated).

[April 26, 1974].

Appeal from the United States District Court for the Central District of California.

Before: BROWNING and GOODWIN, Circuit Judges, and MURRAY,* District Judge

The appellants, Joe Rogers and Gertrude Rogers, appeal from a partial summary judgment and a final summary judgment in favor of the appellee, the United States. The judgments, both entered in the same action, enjoin the Rogers from constructing and maintaining a road across National Forest land without a permit and reject the Rogers' counterclaim asking for a declaration of their right to an easement over such a road.

The Court of Appeals has jurisdiction over the consolidated appeals by virtue of 28 U.S.C. §1291, both judgments being final and a timely notice of appeal being filed from each.

The Rogers own 160 acres of private property that is surrounded by Los Padres National Forest in Ventura County, California. In 1964 they built a small access road leading from their property out through the forest to a public road 3.4 miles away. Their right to keep and maintain that access road is the subject of this law suit.

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*Honorable William D. Murray, Senior United States District Judge, District of Montana, sitting by designation.

The public road running closest to the Rogers' 160 acres is Lockwood Creek Road, which can be reached only by crossing through 3.4 miles of National Forest. Since the days of old, access to Lockwood Creek Road has been made by an old "wagon trail". The wagon trail is rough but can be negotiated by motor vehicles with 4-wheel drive. During times of heavy rain, parts of the "trail" wash out and even in good weather the trail is too rustic for ordinary vehicles with 2-wheel drive.

In 1964, the Rogers decided to construct another access road that would run approximately parallel to the old trail, but would be higher in the hills where washouts would not occur and which would be gentler and able to convey vehicles with 2-wheel drive. The Rogers filed an application with the Forest Service for a "special-use permit" to build a road, but later built the road without a permit. The Rogers claim that Forest Officer Plisco told them they did not need a permit. Plisco denies having said this.

On April 19, 1971, the United States filed a complaint alleging that the new road trespassed on government property since it was built without a special-use permit as required by 36 C.F.R. §251.1(a)(1). The United States sought to enjoin further use of the road and to have the Rogers restore the road to its original state.

In summary judgments of March 23, 1972, and July 14, 1972, the district court denied the counterclaim; ordered Rogers to return to the United States full possession of the land across which the new road ran; ordered the Rogers to restore that land to its prior condition; and enjoined the Rogers from constructing any new road, or maintaining any road which they had con-

structed, unless they first obtained a special-use permit. On April 6, 1972, the Rogers filed an application for a special-use permit. The Forest Service has declined to issue a permit pending the outcome of this litigation.

On appeal, the Rogers allege that there were factual issues which required a trial and which made summary judgment inappropriate. In particular, Rogers claim that a trial should be had to determine if the 1964 construction was a "trail". Prior to an amendment of the regulations in 1968, 36 C.F.R. §251.5(e) provided that "trails may be constructed without permit upon consent and under the supervision of a Forest Officer." If the new construction is a "trail", and consent and supervision existed, the construction was lawful and the Rogers could not be ordered to restore the land or be enjoined from using the route in its present condition. The physical character of the new construction is not disputed. The only question is whether it should be designated a "road" or a "trail". We agree with the trial judge's conclusion that, as a matter of law, a passageway 12 feet wide, cleared by a bulldozer, and accessible in the family station wagon, is a "road" within the meaning of the regulations.

The Rogers also claim that the question of whether or not Ranger Plisco consented to the construction is a material issue on the theory that such consent would equitably estop the United States from challenging the 1964 construction. Such is not the law. Regardless of Plisco's consent, the United States cannot be estopped in this instance. Ordinarily, the United States is neither bound nor estopped by the acts of its officers or agents, *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1916). Equitable estoppel may be applied against the government acting in its proprietary capac-

ity, *United States v. Georgia-Pacific Company*, 421 F. 2d 92, 100 (9th Cir. 1970), or perhaps when acting in its sovereign capacity if affirmative acts of misconduct are clearly established. See *Lee You Fee v. Dulles*, 236 F.2d 885 (9th Cir. 1956); see also *I&NS v. Hibi*, 414 U.S. 5 (1973); *Montana v. Kennedy*, 366 U.S. 308 (1961). The care and preservation of forest land is a sovereign task, and no affirmative acts of misconduct were established by the affidavits filed by defendants-appellants below.

The judgment of the lower court is affirmed and that portion of the judgment requiring appellants to restore the land to its prior condition is stayed pending completion of administrative proceedings on application for special permit.

AFFIRMED.

APPENDIX II.

Order.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. Joe E. Rogers and Gertrude K. Rogers, Defendants-Appellants. No. 72-2148, No. 72-2456, (Consolidated).

Appeal from the United States District Court for the Central District of California.

Before: BROWNING and GOODWIN, Circuit Judges, and MURRAY,* District Judge.

The concluding paragraph of the Memorandum of Affirmance filed April 26, 1974, is modified to read as follows:

> The judgment of the lower court is affirmed and that portion of the judgment requiring appellants to restore the land to its prior condition is stayed until completion of administrative proceedings now pending.

The Petition for Rehearing is denied.

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*Honorable William D. Murray, Senior United States District Judge, District of Montana, sitting by designation.